

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL INC.**

and

CASE 08-CA-135971

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1982, AFL-CIO**

**MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL INC.**

and

CASE 08-CA-136613

DON RUSSELL, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions.¹ Based upon the reasons fully developed below, Counsel for the General Counsel respectfully submits that the record evidence and cited case law fully support

¹ Administrative Law Judge Paul Bogas will be referred to as ALJ; Midwest Terminals of Toledo International Inc., will be referred to as Respondent; International Longshoremen's Association , Local 1982, AFL-CIO will be referred to as Union; references to the official transcript in the proceeding in 08-CA-119493, et al., will be referred to as "Tr. I". References to the official transcript in this proceeding will be referred to as "Tr. II". General Counsel's Exhibits will be referred to as "G.C. Exh." Respondent Exhibits will be referred to as "R. Exh." Joint Exhibits will be referred to as "Jt. Exh." Union's Exhibits will be referred to as "U. Exh.", and Respondent's Brief in Support of Exceptions shall be referred to as R. Brief.

the ALJ's analysis and conclusions with regard to the exceptions taken by Respondent and the Decision of ALJ Paul Bogas should be adopted by the Board.

I. INTRODUCTION

Respondent is engaged in the business of loading and unloading cargo from vessels and trucks and warehousing product at the port facility. (Jt. Exh. 1). The work is performed by two bargaining units. One bargaining unit is represented by Local 1982, and the other bargaining unit is represented by Teamsters Local 20. (Jt. Exh. 1; G.C. Exh. 60; Tr. I 518-520).

The instant case arises out of the relationship Respondent has with Local 1982. Local 1982 and Respondent are operating under the terms of an expired collective bargaining agreement that was effective from January 1, 2006 through December 31, 2010. (Jt. Exh. 1; Tr. I 1769). The Union was placed in trusteeship from about April 2010 through July 2012. By August 2012, the Union was no longer controlled by the trustees and Otis Brown became the Union's president.

II. ALJ BOGAS' PREVIOUS DECISION

In Case 08-CA-119493 et. al, on December 1-3, 2014, January 27-30, 2015, April 7-9, 2015, and April 20, 2015, ALJ Bogas held a hearing concerning a myriad of Section 8(a) (1), (3), (4), and/or (5) violations involving the Respondent and Union.

On January 21, 2016, ALJ Bogas issued his decision and found that the Respondent violated the Act by: 1) threatening Union Steward Prentis Hubbard; 2) failing to pay Prentis Hubbard for the time he would have worked had he not been injured; 3) terminating Union President Otis Brown; 4) unilaterally re-assigning the loading/unloading of aluminum and calcium; and 5) unilaterally eliminating informal crane training for unit employees. See *Midwest Terminals of Toledo Int'l*, 2016 WL 275278 (N.L.R.B. Division of Judges January 21, 2016).

Prior to the issuance of ALJ Bogas' decision in the above-mentioned case, Deputy Chief Administrative Law Judge Arthur Amchan issued an Order dated March 20, 2015, which provided that the record and credibility determinations in that case could be considered in deciding the instant case. (ALJD 3; G.C. Exh.A 1(t). For that reason, the previous case will be referred to as Midwest Terminals 1.

III. THE BOARD SHOULD DEFER TO THE CREDIBILITY DETERMINATIONS OF THE ALJ REGARDING THE SKILLED LIST (EXCEPTION)

Respondent in its Exceptions fails to identify the specific credibility determinations to which it takes exception. Instead, it appears to challenge the ALJ's credibility determinations, primarily concerning Respondent's witness Terry Leach at various points in its brief, and it is unclear as to what exactly Respondent is arguing and why. ² (R. Brief, p. v).

The Board's established policy is not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 363 (3d Cir. 1951).

In Midwest Terminals 1, ALJ Bogas determined that Leach's testimony was "unusually unreliable".³ The ALJ observed Leach's demeanor at the hearing in the instant case and correctly determined that Leach, who had been evasive and self-contradictory in Midwest Terminals 1, continued to exhibit those tendencies when he testified in this case. For example, in Leach's initial testimony regarding the Respondent and Union's past practice of discussing employees to include on the core list of skilled employees prior to the placement of employees

² General Counsel will address the ALJ's credibility determinations throughout its brief.

³ See *Midwest Terminals 1*, p. 4, fn. 3

on the list, Leach initially denied that the practice existed, and grudgingly conceded the practice when presented with his testimony in another unrelated unfair labor practice hearing before ALJ Mark Carissimi⁴ involving the Respondent and Union. (ALJD, p. 3; Tr. II, p. 47-50, 52).

The ALJ specifically pointed out that he found the testimony of Respondent's witness Human Resource Manager Christopher Blakely more reliable where it conflicted with Leach's testimony. (ALJD p. 5, fn. 6). Indeed, contrary to Leach's testimony, Blakely admitted that the Respondent and Union traditionally met to discuss and confer before selecting employees to the skilled list. (Tr. II, p. 646-656). The ALJ determined that Blakely's admission was bolstered by Respondent's written response to several grievances and the testimony of Union President Otis Brown. (ALJD, p. 7. R. Exh. J, N, O, 139; Tr. II, p. 845-852).

Thus, the ALJ's credibility findings were explained at length and well-reasoned. The Respondent has not demonstrated that a clear preponderance of the relevant evidence proves otherwise pursuant to *Standard Drywall*.

IV. THE ALJ CORRECTLY DETERMINED THAT THE COMPLAINT ALLEGATIONS IN PARAGRAPH 10 (A) AND (B) WERE NOT TIME-BARRED BY SECTION 10(B) OF THE ACT AND THAT RESPONDENT UNILATERALLY CHANGED THE CRITERIA AND SELECTION PROCEDURE FOR PLACING INDIVIDUALS ON THE SKILLED LIST (EXCEPTIONS II AND IV)

The ALJ correctly determined that the Complaint allegations alleging that Respondent: 1) unilaterally ceased its practice of meeting to discuss and confer with the Union regarding the selection of skilled list employees; and 2) failed to apply seniority and certain qualification requirements to fill vacancies, were not time-barred. (ALJD p. 17-18, fn. 24-25).

⁴ See *Midwest Terminals of Toledo Int'l*, 362 NLRB No. 57 (2013) (Board upheld ALJ Carissimi's decision that included a finding that Respondent violated the Act when it: 1) threatened not to hire certain employees because the filed grievances and unfair labor practice charges; 2) coercively told employees the Union caused them to lose overtime; 4) threatened to remove Steward Mark Lockett from the job, and threatened to discharge Lockett and Miguel Rizo because of their union activities; 5) physically grabbed Lockett; 6) refused to assign work to Otis Brown; and 7) unilaterally ceased deducting dues check off pursuant to a memorandum of understanding.

It is well established that the Section 10(b) limitation period does not begin to run “until the charging party is on “clear and unequivocal notice” of a violation.” *Ohio and Vicinity Regional Council of Carpenters*, 344 NLRB 366, 367 (2005). The notice may be either actual or constructive. *Id.*

In making his determination, the ALJ correctly relied upon the testimony of Christopher Blakely and Otis Brown, the language in the collective bargaining agreement and documentary evidence consisting of Respondent’s letters and grievance responses sent to the Union, which confirmed its past practices. (ALJD p. 17-18, fn. 24-25). Based on record testimony and documentary evidence, the ALJ correctly found that the parties had an established practice of meeting and conferring prior to selecting employees to be placed on the skilled list.

In about 2008 or 2009, Leach admitted that he and former Union President Moody negotiated employees’ placement on the skilled list. (Tr. II, p. 32). In 2010 through 2012, the Respondent and Local 1982 Co-Trustees discussed the placement of employees on the skilled list. (Jt. Exh. C; Tr. II, p. 32-33, 57-58, 436-437, 640-642, 645-646, 845-848). In 2011, the parties reached an agreement to place employee Otis Brown on the skilled list. (Tr. II, p. 845-849).

Most recently, in early 2013, the parties discussed the placement of two additional employees on the skilled list, Fred Victorian Jr. and John Murphy. (Jt. Exh. C; Tr. II, p. 482-483, 646-656; R. Exh. O, 139). In this instance the parties were unable to reach agreement on the employees who would fill skilled list vacancies.⁵ No employees were added to the list.

In support of the past practice, the ALJ noted that Respondent’s witness Blakely, in a Step Two Grievance response, states that the parties conferred prior to filling vacancies on the

⁵ Blakely, in a letter dated February 27, 2013 informed Union President Brown, that skilled list vacancies could be discussed once a Board decision issued in Case 08-CD-086589. (R. Exh. J, N, O, 139; Jt. Exh. C).

skilled list and that this practice “was true before ILA Local 1982 was placed in trusteeship on April 23, 2010, it was true during the 27-month trusteeship, and the practice remains the same since August 7, 2012 when the company was officially informed that ILA Local 1982 had emerged from trusteeship.” (ALJD, p. 7; R. Exh. 139).

It wasn’t until April 2014, that Respondent deviated from the established past practice and arbitrarily placed two employees, Ricardo Canales and Joseph Victorian Jr. on the skilled list without notifying or bargaining with the Union. (ALJD, p. 7; Jt. Exh. C). Union President Brown, Vice-President Hubbard, and Steward Russell testified that there was no prior discussion with the Union regarding adding employees to the 2014 skilled list. (Tr. II, p. 435-36, 823). Consistent with their testimony, Blakely admitted that there was no discussion with the Union when he prepared and sent the Order of Call sheet to the Union, which added Canales and Joseph Victorian Jr. to the list. (Tr. II p. 63). Blakely testified that Leach instructed him to place them on the 2014 skilled list. (Tr. II, p. 43-45).

On this point, Respondent ignores the overwhelming evidence presented at the hearing, which supports the ALJ’s finding that Respondent’s past practice of meeting and conferring with the Union regarding skilled list vacancies, changed for the first time in April 2014.

Even though there is no question that the Union filed the charge on September 5, 2014, within the 6-month period as required by the Act, the Respondent argues that the 10(b) period began in 2012 when the Union made attempts to convince the Respondent to place employees on the skilled list. (R. Brief, p. 15) Those facts are immaterial because Respondent did not add employees to the skilled list during that period. It is undisputed that the last time, prior to 2014, the Employer added an employee to the list and conferred with the Union was in July 2011 when Otis Brown was placed on the list. (Jt. Exh. C).

Respondent also argues that ALJ's Carissimi's findings in *Midwest Terminals of Toledo Int'l*, 362 NLRB No. 57 (2013) are material to the findings in the instant case. (R. Brief, p. 23). This is simply not true. As a matter of clarity, ALJ Carissimi's unfair labor practice hearing did not consist of complaint allegations related to the unilateral changes in selection criteria for skilled list placements, and/or meeting with the Union to discuss skilled list vacancies.

Even so, General Counsel used Leach's testimony from Carissimi's hearing to support General Counsel's position here, that the parties met prior to placing employees on the skilled list. Indeed, as noted earlier in the brief, Leach grudgingly conceded that this was the parties' established practice after reviewing his prior testimony. (Tr. II, p. 49-53). Thus, the ALJ had no reason to consider Respondent's argument on this issue.

The record evidence shows that no employee on the skilled list between 2010 and 2013 lacked the requisite four of five designated qualifications and the seniority necessary to be on the list. (Jt. Exh. 1, C). It was not until Respondent issued the April 27, 2014 list that the Union was aware that the Employer changed its criteria in selecting employees on the list. (Jt.Exh. C). At that time Respondent placed Joseph Victorian Jr. on the list. Joseph Victorian was skilled in only three of the designated qualifications. (Jt. Exh. C).

As demonstrated by the record evidence, the ALJ correctly concluded that the Complaint allegations 10(A) and (B) were not time-barred, and that Respondent unilaterally changed both the criteria and selection for placing individuals on the skilled list within the 10(b) period. (ALJD, p. 17-18, fn. 24-25).

V. ALJ BOGAS CORRECTLY CONCLUDED THAT THERE WAS NO EVIDENCE THAT THE UNION WAIVED ITS RIGHT TO BARGAIN OVER THE PLACEMENT OF INDIVIDUALS ON THE SKILLED LIST (EXCEPTION III)

The record evidence establishes that the Union never waived its right to bargain over the placement of individuals on the skilled list. A union can only waive its right to bargain if an employer has previously provided the union notice and an opportunity to bargain over the change. See *Rockwell Corp.*, 260 NLRB 1346 (1982). In the absence of clear notice of an intended change, there is no basis to find that a union waived its right to bargain over the change. *Id.* Here, there was no evidence presented that prior to April 2014, the Respondent notified the Union that it intended to place employees on the skilled list without first meeting and conferring with the Union and/or that it had changed its criteria for selecting employees to be on the list.

In its exception, the Respondent appears to rely on grievance discussions with the Union in 2012 and 2013 regarding individuals the Union and/or Respondent sought to be placed on the skilled list, as notice and an opportunity to bargain over the change. (R. Brief, p. 18-19). Yet, the record is devoid of evidence that Respondent gave the Union notice or opportunity to bargain over a change in the criteria for selecting employees on the list.

ALJ Bogas noted that in a September 16, 2013 letter, Blakely informed the Union that Ricardo Canales was the only individual it believed was eligible for the skilled list. The letter however, does not explain the specific criteria it applied, or the basis on which it claimed that Canales, but not others was eligible for placement on the skilled list. (ALJD, p. 8, fn. 10; Tr. II p. 612-613). Two weeks later, Respondent changed its position and claimed no one was eligible for placement on the skilled list, and provided no rationale to support this claim. (ALJD, p. 8, fn. 10, Tr. II, p. 612-613). These actions, however, did not establish that the Union had clear and unequivocal notice that Respondent had changed its selection criteria or its established practice of meeting and conferring with the Union regarding skilled list placements.

Contrary to Respondent's assertion that the ALJ did not consider its argument that the Union waived its right to bargain, the ALJ correctly determined that Respondent never gave the Union prior notice of the change, much less the requisite clear and unequivocal notice, that it was changing the practice. (ALJD p. 18, fn. 25; R. Brief, p. 18).

VI. ALJ BOGAS CORRECTLY DETERMINED THAT FRED VICTORIAN JR. AND DON RUSSELL WERE QUALIFIED FOR PLACEMENT ON THE SKILLED LIST OVER JOSEPH VICTORIAN JR. (EXCEPTION V)

The collective bargaining agreement provides that employees on the skilled list must be qualified in four (4) or more of the following positions: signalman, checker, hatch leader, crane operator or power operator (forklift/endloader). (Jt. Exh. 1).⁶ The collective bargaining agreement also provides that qualifications and seniority shall be applicable to fill vacancies on the skilled list. (Jt. Exh. 1). At the start of the April 2014 shipping season, Joseph Victorian Jr. had less seniority than employee Ricardo Canales and Stewards Don Russell and Fred Victorian Jr.⁷ (Jt. Exh. C). Joseph Victorian Jr. was only qualified in three areas: power operator, crane, (lucas crane), and hatch leader. (Jt. Exh. C). The ALJ correctly observed that all five of the Order of Call lists that the Respondent issued leading up to Joseph Victorian's placement on the skilled list, as well as on the Order of Call lists issued subsequent to his placement on the skilled list showed that he did not have the required qualifications to be on the list. (ALJD, p. 9-10, 17; Jt. Exh. C). Even so, the Respondent placed him on the list without conferring and meeting with the Union.

⁶ Blakely, who is responsible for preparing the list of qualifications for each employee, testified that lowercase and uppercase letters on the list of qualifications mean that the employee is qualified in that classification. (Tr. 671-672).

⁷ In April 2008, Joseph Victorian Jr. was terminated by Respondent. (Tr. II, p. 776). Therefore his name does not appear on the Order of Call list until September 10, 2013, and he had less seniority than Russell and Fred Victorian Jr. (Jt. Exh. C).

ALJ Bogas determined that Russell was the most senior employee eligible to be placed on the skilled list and that he possessed four of the five qualifications. Russell was qualified as a signal person, checker, power operator (forklift), and hatch leader. (ALJD, p. 8-9; Jt. Exh. C).

Respondent, in its exceptions argues that Russell is not a qualified hatch leader, and thus is not qualified to be on the skilled list. As noted by the ALJ, the hatch leader position is the only qualification that Respondent does not provide written documentation to confirm an individual is qualified. (ALJD, p. 9; Jt. Exh. C). The ALJ determined that Russell was a qualified hatch leader based on the following: 1) Respondent assigned Russell to the hatch leader position in 2009 and 2010; 2) Brown corroborated Russell's testimony and confirmed that the persons assigned to the hatch leader position was qualified to do the job; 3) Leach admitted that Russell had been previously assigned as a hatch leader; and 3) Leach ambiguously testified that he did not know whether Russell was a qualified hatch leader. (Tr. p. 188, 439-444). Leach was asked whether Russell was a qualified hatch leader, and he stated, "No, I don't know that I would consider him qualified." (Tr. II, p. 733). The ALJ noted that he did not know whether Leach meant this as a denial that Russell was a qualified hatch leader, but that Leach's statement was not clear. (ALJD. P. 9)

The ALJ correctly reasoned that Leach's testimony on this issue was representative of his tendency to give self-serving, unreliable testimony. Moreover, the evidence contradicted Leach's suggestion that Russell was not qualified. (ALJD, p. 9).

The ALJ similarly determined that the record showed that Fred Victorian Jr. met the qualification requirements for the skilled list as a signal person, a checker, a power operator (forklift) and a hatch leader. (ALJD, p. 9, Jt. Exh. C).

In its exception, Respondent argues that Fred Victorian Jr. was not a qualified signal person because he did not pass the written portion of the NCCCO certification requirements.⁸ To this end, Respondent urges the Board to take judicial notice of select portions of 29 C.F.R. § 1926.1248 (C.F.R.). The C.F.R. provides information concerning NCCCO certification requirements for signal persons. General Counsel asserts that the C.F.R. has little probative value here for the following reasons: 1) the C.F.R. was not raised by the Respondent at the hearing, thus no witness testified how or what portion of the C.F.R. precluded Fred Victorian Jr.'s qualification as a signal person; 2) The Respondent only attached selected portions of the regulation, rather than the full text; 3) Fred Victorian Jr. had been qualified as a signal man since April 2013, while the Respondent continued to use employees to signal for the lucas crane; 4) Brown testified that Fred Victorian Jr. performed signaling duties while he operated the lucas crane and the liebherr crane; and 5) Blakely, who prepared the Order of Call sheet for the past four years testified that the "sg" by Victorian's name on the Order of Call sheet confirms that he was a qualified signal person. (G.C. Exh. 2; Tr. II, 637, 852, Jt. Exh. C)

Based on the factors above the Board should give no weight to the select portions of the C.F.R. offered by Respondent.

Further, in light of those factors and the well-reasoned credibility determinations made on this issue, the ALJ correctly determined that Russell and Fred Victorian Jr. were eligible to be placed on the list, and Joseph Victorian Jr. was not eligible for placement.

The ALJ correctly determined that Respondent's failure to place Fred Victorian Jr. also violates Section 8(a)(3). (ALJD p. 9, 19-20). Respondent incorrectly asserts that the ALJ's

⁸ The NCCCO requirements were used by Respondent for the Port Authority owned liebherr cranes. (R. Brief, p. 10, fn. 5). Respondent's employees were not evaluated by a third party when operating the lucas cranes.

decision on this issue was made based on a single statement. (R. Brief, p. 29-30). The record, however, shows that he was a very active union steward.

It demonstrates that Fred Victorian Jr. regularly filed grievances in 2012 and 2013, engaged in work disputes related to union and protected concerted activities and filed several unfair labor practice charges. (G.C. Exh. 2, F, 127). The ALJ specifically noted this activity in his decision. (ALJD, p. 9, 19). Given the amount of Fred Victorian Jr.'s grievance filing and other activities, as well as the fact that Respondent selected employee Joseph Victorian Jr., who was not qualified and had less seniority than Fred Victorian, the ALJ determined Respondent did not have a legitimate basis for its actions and that they were rather based on his union animus. (ALJD, p. 19).

VII. ALJ BOGAS DID NOT ERR WHEN HE FAILED TO FIND THAT AN ADVERSE INFERENCE SHOULD BE DRAWN BECAUSE GENERAL COUNSEL DID NOT CALL UNION TRUSTEES AS WITNESSES IN ITS CASE (EXCEPTION VI)

In its exception, Respondent asserts that ALJ Bogas should have drawn an adverse inference because General Counsel did not call Union trustees Andre Joseph and Baker Jr., to testify about certain meetings they held with Respondent regarding skilled list placements. It is well established that an adverse inference is available against the party with the burden of persuasion on an issue or against the party who is relying on the statements of an uncalled witness. *KBMS, Inc.*, 278 NLRB 826 (1986); *Van Dorn Plastic Machinery*, 265 NLRB 864 (1982).

The failure to call a witness permits, but does not require, the drawing of an adverse inference. That determination depends upon the particular circumstances in each situation. See *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005) (Board held that failure to call additional

corroborative witnesses does not support an adverse inference). In the present case an adverse inference is not appropriate.

General Counsel called four witnesses to testify on this issue. One witness, Christopher Blakely was called pursuant to Section 611(c). Blakely's testimony, both on direct and cross examination fully supports General Counsel's position that the parties had an established practice of meeting and conferring with the Union prior to employees being placed on the skilled list. (ALJD, p. 7). His testimony substantiated those facts as it relates to Respondent's negotiation with the Union trustees Joseph and Baker Jr.

Based on Blakely's admission and Brown's corroborating testimony, as well as the overwhelming supporting documentation introduced into evidence, the ALJ found that the practice existed. (ALJD, p.7-8, fn.10). Similarly, Terry Leach under cross examination grudgingly admitted that the parties had an established practice of meeting and conferring prior to employees being placed on the skilled list. (Tr. II, 43-47, 52). Leach's testimony corroborates Blakely's testimony and documents that showed the practice existed, thereby eliminating any need to call witnesses to further prove General Counsel's case. *Id.* See also *Guardian Industries Corp.*, 319 NLRB 542, 548 (1995), (Board upheld ALJ's finding that an employer's lack of corroborating witnesses to support its position warranted a conclusion that its failure to call witnesses in its control raises an inference that their testimony would adversely affect the employer, citing *International Automatic Machine*, 285 NLRB 1122 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988). In the instant case there was no lack of corroborating witnesses and evidence.

Additionally, General Counsel called three witnesses, Union President Brown, Vice-President Hubbard, and Steward Russell to confirm the Respondent never changed its practice of

meeting with the union prior to selecting employees to the skilled list and the criteria for selecting employees to be placed on the list prior to April 2014.

Under these circumstances, ALJ Paul Bogas correctly determined that an adverse inference should not be drawn concerning General Counsel's decision not to call ancillary witnesses Joseph and Baker Jr.

VIII. ALJ BOGAS PROPERLY GRANTED GENERAL COUNSEL'S MOTION TO STRIKE RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

In its supplemental authority, Respondent sought to introduce the testimony of Union trustee Andre Joseph. The testimony was taken from an unrelated December 3, 2015 unfair labor practice hearing in Case 08-CA-152192 held before ALJ Eric Fine. The Board and administrative law judges have granted motions to strike when a party attempts to supplement the record with testimony or documents that were not admitted into evidence, and thus were not part of the record. *Comar, Inc.*, 349 NLRB 342, 352 (2007); See *Today's Man*, 263 NLRB 332 (1982).⁹ In *Today's Man*, the Board granted the General Counsel's motion to strike a transcript from a subsequent, unrelated criminal hearing because it was not admitted into evidence during the current hearing. The Board reasoned, as it should here, that consideration of such documents would deny the parties the opportunity for voir dire and cross-examination. *Id.* at 333.

The testimony Respondent seeks to admit is ambiguous, and does not confirm or deny allegations in the instant case. The ruling made by the Board in *Today's Man*, that a transcript

⁹ ALJ noted that the Board has permitted parties to submit "supplemental authority" after briefing, but "supplemental authority" means case law citations not testimony from unrelated hearings. See *Reliant Energy*, 339 NLRB 66 (2003)

from an unrelated case denies the party an opportunity to cross-examine the witness is applicable here. See also Section 102.45(b) of the Board's Rules and Regulations.¹⁰ (ALJD, p. 7 fn. 9).

In accordance with Board law and the Board's Rules and Regulations, ALJ Bogas properly granted General Counsel's Motion to Strike Respondent's Notice of Supplemental Authority.

XI. CONCLUSION

Accordingly, Counsel for the General Counsel respectfully submits that Respondent's exceptions are without merit.

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¹⁰ Section 102.45(b) of the Board's Rules and Regulations provide that "The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering brief as provided in 102.46 shall constitute the record in the case."

CERTIFICATE OF SERVICE

A copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was electronically filed through the NLRB website on June 17, 2016 with the Board and a copy was electronically mailed on the same day to the following:

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